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9  
10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE DISTRICT OF ARIZONA**

12 CARRIE FERRARA CLARK,

13 Plaintiff,

14 vs.

15 CITY OF TUCSON,

16 Defendant.

No. 4:14-CV-02543-TUC-CKJ

**PLAINTIFF CARRIE CLARK'S  
REPLY BRIEF REGARDING  
SPOUSAL PRIVILEGE**

Hon. Cindy Jorgenson

17 Plaintiff Carrie Ferrara Clark (Plaintiff), by and through undersigned counsel, and per  
18 the Court's Order dated February 7, 2017 (Doc. 64), hereby submits her reply brief regarding  
19 the application of the spousal communication privilege to this case, and urges the Court to  
20 uphold her privilege to have confidential communications between her and her husband,  
21 Gordon Clark (Mr. Clark), excluded from the evidentiary record.

**MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. Relevant Facts**

23 Plaintiff has worked for the Tucson Fire Department (TFD) since 2007. At all times  
24 relevant to this case, she has been married to Mr. Clark. Mr. Clark is also employed by TFD.  
25 On July 19, 2012, Plaintiff gave birth to her son, and returned to work on October 27, 2012.  
26 Plaintiff was breastfeeding and expressing milk for her son when she returned to work. TFD,  
however, lacked both legally-compliant space to express breast milk as mandated by federal  
law, and did not have an internal scheduling process for handling accommodations required  
for mothers expressing breast milk. After Plaintiff complained, TFD subjected Plaintiff to

1 unlawful harassment and retaliation because of her request for reasonable accommodation  
2 under the law. From August to November 2014, Plaintiff was on maternity leave after the  
3 birth of her second child. TFD continued to subject Plaintiff to harassment and retaliation  
4 following her return to work after the birth of her second child.

5 On January 10, 2017, the City of Tucson (City) conducted a deposition of Mr. Clark  
6 as part of discovery for the case at bar. During the deposition, Defendant repeatedly attempted  
7 to question Mr. Clark on the content of his confidential communications with Plaintiff about  
8 the events that gave rise to this case.

## 9 **II. Legal Standard**

10 The marital communications privilege “bars testimony concerning statements  
11 privately communicated between spouses.” *U.S. v. White*, 974 F.2d 1135, 1137 (9th Cir.  
12 1992). This privilege applies in both criminal and civil cases. 3 Handbook of Fed. Evid. §  
13 505:2 (7th ed.). Further, the privilege applies to both oral and written communications. *See*  
14 *e.g. U.S. v. Montgomery*, 384 F.3d 1050, 1057 (9th Cir. 2004).

15 When the following three conditions are present at the time of a communication  
16 between spouses, the communication is privileged under federal common law. *In re Reserve*  
17 *Fund Securities and Derivative Litig.*, 275 F.R.D. 154, 157 (S.D.N.Y. 2011). First, there must  
18 be a valid marriage (as defined under state law) at the time of the communication. *U.S. v.*  
19 *Lustig*, 555 F.2d 737, 747 (9th Cir. 1977). Second, the communication in question must be  
20 an utterance or expression intended to convey a message from one spouse to the other. *Id.* at  
21 748. Finally, the communication must have been made in confidence. *Pereira v. U.S.*, 347  
22 U.S. 1, 5 (1954).

23 There is a presumption under the federal common law that communications between  
24 spouses are confidential. *U.S. v. Strobehn*, 421 F.3d 1017, 1021 (9th Cir. 2005). The burden  
25 rests with the party opposing the privilege to prove that the communication was not made in  
26 confidence, and that the privilege should thus not apply. *Id.* The opposing party can only  
rebut the presumption of confidentiality by proving facts that suggest the communication was  
not intended to be private, or that there was a third party present at the time of the  
communication. *Pereira*, 347 U.S. at 6. The marital communications privilege pertains

1 individually to each specific communication, not to communications between the two spouses  
2 as a whole. *See e.g. Blau v. U.S.*, 340 U.S. 332, 333 (1951) (“this Court recognized that a  
3 confidential communication between husband and wife was privileged”). The privilege can  
4 be invoked by either spouse to render the contents of a communication between the two  
5 inadmissible. *U.S. v. Marashi*, 913 F.2d 724, 729 (9th Cir. 1990).

6 The marital communications privilege is grounded “upon considerations of public  
7 policy.” *Arizona Title Guarantee & Trust Co. v. Wagner*, 251 P.2d 897, 899 (Ariz. 1952),  
8 *citing Sexton v. Sexton*, 105 N.W. 314, 315 (Iowa 1905). This policy is to protect the  
9 “confidences inherent in the marital relation,” so as to “guard and foster the marital relation.”  
10 *Id.* Thus, the privilege bars the introduction of communications that would not have been  
11 shared “but for the marriage relation and the confidence growing out of it,” or that “would  
12 tend to unduly embarrass or disturb the parties in their marital relations.” *Id.* The Supreme  
13 Court of Arizona has held that “it would seem proper that all marital communications are by  
14 implication confidential, and that the contrary intention must be made to appear by the  
15 circumstances of any given instance.” *Id. citing Wigmore on Evidence*, 3rd Ed. Vol. VIII, §  
16 2336, page 640.

### 17 **III. Argument**

18 In this case, Defendant asks the Court to ignore Plaintiff’s marital communications  
19 privilege simply because she and her husband work for the same employer, and may have  
20 discussed topics at issue in this case. This request is completely unsupported by legal  
21 authority, and would completely eviscerate the public policy considerations behind the  
22 marital communications privilege. Unless a specific communication was made in the  
23 presence of a third party, or unless it was made with the knowledge and intention that it later  
24 be disclosed to a third party, that communication is privileged from discovery in this case.  
25 Further, all communications between Plaintiff and Mr. Clark are presumptively privileged,  
26 and it is Defendant’s responsibility to establish that the communication was public or  
disclosed before it can ask about its content. Thus, Defendant’s line of questioning proposed  
in its brief should be rejected, unless and until it can provide foundation for the  
communication to not be privileged.

1 Here, the marital communications privilege presumptively bars the introduction of the  
2 content of discussions between Plaintiff and Mr. Clark into the evidentiary record. There is  
3 no genuine dispute as to whether or not a valid marriage existed between the Clarks at all  
4 times relevant to this case. Thus, the marital privilege applies to bar all “utterance[s] or  
5 expression[s] intended to convey a message from one spouse to the other.” *Lustig*, 555 F.2d  
6 at 747. To defeat the privilege, Defendant must establish that a specific communication was  
7 not made in confidence. A wholesale waiver of the marital communications privilege like the  
8 one Defendant is requesting is unprecedented, and would frustrate the important public policy  
9 of fostering marital relationships by promoting confidence between spouses.

10 Throughout Mr. Clark’s deposition, Defendant sought to elicit testimony from Mr.  
11 Clark about the content of his confidential communications with his wife:

12 Assistant City Attorney Michelle Saavedra (Saavedra): And the comments  
13 that we talked about being in the [news]paper, did you ever discuss those  
14 comments with Carrie?

15 ...

16 Mr. Clark: Yes.

17 Saavedra: What was your discussion?

18 Gordon Clark Deposition Transcript (Gordon Depo.), Defendant’s Exhibit 2, p. 24, l. 14-16,  
19 p. 25, l. 4-5.

20 Saavedra: Did you talk to Carrie about the fact that you were going to be  
21 submitting this memo?

22 *Id.*, p. 29, l. 23-24.

23 Saavedra: Did Carrie -- was Carrie interviewed as part of the internal  
24 investigation?

25 Mr. Clark: I believe so.

26 Saavedra: Did she talk to you about that interview?

*Id.*, p. 34, l. 9-12.

Saavedra: Did Carrie talk to you about the complaint that she filed with the  
City Manager’s Office?

1 *Id.*, p. 36, l. 16-18.

2 Each of these questions elicits the contents of specific communications between  
3 Plaintiff and Mr. Clark without establishing the requisite foundation to suggest that the  
4 communications are not privileged. In fact, the instances of communication in these questions  
5 are exactly the type of questions prohibited by the marital communications privilege.  
6 Discussions between spouses pertaining to negative and offensive comments on a newspaper  
7 article, or to workplace disputes and discipline, are likely to contain highly sensitive, and  
8 perhaps emotionally charged information that would not be shared but-for the marital  
9 relationship. Disclosure of such information, especially during a deposition or trial, is likely  
10 to cause great discomfort or embarrassment to one or more spouses. The primary public  
11 policy purpose for the marital communications privilege is to foster marital relations by  
12 promoting discussions between spouses about difficult issues like workplace disputes,  
13 without fear that the information may one day become public knowledge. To order disclosure  
14 of the answers to these questions in this case would be to completely frustrate this public  
15 policy. Further, common law *presumes* that these discussions are confidential, and therefore  
16 it is up to Defendant to prove if they were not. Defendant has failed to provide any such proof,  
17 and thus its request to compel Mr. Clark to answer the questions above should be denied.

18 Defendant argues that the marital communications privilege is waived when one of  
19 the spouses “raises an issue by initiating a lawsuit and seeking damages.” This assertion is  
20 completely unsupported by the well-established common law of spousal privilege, and  
21 contrary to public policy. Plaintiff is unaware of any case adopting a waiver of the spousal  
22 communication privilege in such a manner, and such an assertion is not present in *Arizona*  
23 *Title Guarantee & Trust Co. v. Wagner*; the case relied upon by Defendant in its argument.  
24 251 P.2d 897, 899 (Ariz. 1952). On the contrary, the Court in *Wagner* stressed the importance  
25 of protecting “the free and unrestrained privacy of communications,” especially in cases  
26 where the disclosure of a communication would embarrass or disturb one or both spouses. *Id.*

Here, Defendant seeks a wholesale waiver of the marital communications privilege for  
any discussions pertaining to issues that may be raised at trial. However, it is these  
communications that are especially likely to be protected by the privilege. There would be no

1 need for a marital communications privilege if it could be overcome simply by a showing  
2 that the contents of the communication are relevant to the case at hand. Instead, the privilege  
3 exists specifically to protect those communications between spouses that are related to the  
4 matter at bar. Defendant attempts in its brief to discover issues related to Plaintiff's motives  
5 and strategy for filing this case, such as her decision to use sick leave to avoid working at  
6 non-compliant fire stations, her reaction to negative comments on the newspaper article about  
7 her complaints, and her reaction to Defendant's investigation of Captain Langejans.  
8 Information like this is highly likely to be discussed between spouses during the trying times  
9 leading up to a lawsuit, and is exactly the type of information that an individual would not  
10 reasonably expect their spouse to disclose during the subsequent litigation. To allow its  
11 disclosure in this case would be to discourage individuals from seeking the advice, counsel,  
12 and support of their spouses when they face potential lawsuits. This would entirely defeat the  
13 public policy goal behind the marital communications privilege.

14 Finally, Defendant argues that it should be able to discover the contents of any  
15 discussions between the Clarks pertaining to events that occurred while she was out on  
16 maternity leave for her second child simply because she was not working at the time, so it is  
17 reasonable to assume that she learned of the events from Mr. Clark. However, such an  
18 assumption is not sufficient to defeat the marital communications privilege. At the outset, it  
19 is not reasonable to assume that Plaintiff must have learned of a fact alleged in her complaint  
20 from Mr. Clark simply because she was out on leave when it occurred. Plaintiff has been a  
21 TFD employee for roughly 10 years. During that time she has established close collegial and  
22 social relationships with numerous TFD employees, many of which witnessed the events that  
23 gave rise to this case. Thus, there are a number of possible sources from whom Plaintiff could  
24 have learned of events that occurred while she was out on maternity leave, not necessarily  
25 just her husband. Thus, the assumption that Plaintiff learned of all of the events in her  
26 complaint that occurred while she was on maternity leave from Mr. Clark is unreasonable,  
and not sufficient to support defeating the marital communications privilege.

Even if the assumption that Plaintiff learned of some of the events in her complaint  
from Mr. Clark was reasonable, such an assumption is insufficient to defeat the marital

1 communications privilege. The Ninth Circuit has held that all marital communications are  
2 presumed confidential, and the burden is on the opposing party to prove that a communication  
3 was made in the presence of a third party or for the purpose of being relayed to a third party.  
4 *Strobehn*, 421 F.3d at 1021. A mere assumption, especially in light of reasonable alternatives,  
5 does not satisfy Defendant's burden of proving that a marital communication is not  
6 privileged. Thus, Defendant should be barred from asking Mr. Clark about his discussions of  
7 the events that gave rise Plaintiff's complaint with Plaintiff simply because she was on  
8 maternity leave when the events occurred.

#### 8 **IV. Conclusion**

9 The marital communications privilege functions as a broad shield to prevent opposing  
10 parties from piercing the sanctity of the marital relationship. The public policy consideration  
11 that provides the primary basis for this privilege seeks to encourage open communications  
12 between spouses. In this case, Defendant seeks to deprive the Clarks of their marital  
13 communications privilege simply because they have the same employer, and may have  
14 discussed some of the issues of this case together. This flies in the face of the marital  
15 communication privilege that is designed to protect exactly the types of conversations that  
16 Defendant seeks to disclose. Unless Defendant can establish that a communication between  
17 the Clarks occurred in the presence of a third party or with the purpose of being relayed to a  
18 third party, such a communication is privileged and cannot be disclosed in discovery. This is  
19 based upon the strong common law presumption that all marital communications are  
20 privileged. Thus, Plaintiff asks that Defendant's request to compel Mr. Clark to answer the  
21 questions outlined in its brief be denied, and that Defendant be cautioned to desist from  
22 pursuing privileged information throughout the remaining course of discovery in this case.

22 DATED this 28th day of February, 2017.

23 **JACOBSON LAW FIRM**

24 *s/ Jeffrey H. Jacobson*  
25 \_\_\_\_\_  
26 Jeffrey H. Jacobson  
Attorney for Plaintiff

1 Filed via the CM/ECF system and copy electronically  
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